

Traverse City Osteopathic Hospital and United Steelworkers of America, AFL-CIO-CLC,
Cases 7-CA-18003, 7-CA-18080, and 7-CA-18947

March 19, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On November 4, 1981, Administrative Law Judge Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The Administrative Law Judge found, *inter alia*, that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employees Elbridge Aldridge and Rita Craven. With respect to Aldridge, the Administrative Law Judge found that Respondent seized on a profane outburst uttered by Aldridge at the hospital cafeteria on January 28, 1981, as a pretext for ridding itself of an active supporter of unionization. While we agree with the Administrative Law Judge's findings in this regard,² we also note that Aldridge's outburst occurred in the context of Aldridge's exercise of union and protected concerted activities, thereby warranting the application of the principles set forth in *Thor Power Company*, 148 NLRB 1379, 1380 (1964), *enfd.* 351 F.2d 584 (7th Cir. 1965).

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Respondent also asserts that the Administrative Law Judge was biased against Respondent in his interpretation of testimony at the hearing. Upon our full consideration of the record, we perceive no evidence that the Administrative Law Judge prejudged the case or demonstrated a bias against Respondent in his analysis or discussion of the evidence. Accordingly, we find totally without merit Respondent's allegation of bias on the part of the Administrative Law Judge.

² We, however, unlike the Administrative Law Judge, place no reliance upon Respondent's written reports to the Michigan Employment Security Commission, wherein Respondent noted that Aldridge was discussing unionization on the date in question. In our view, Respondent's reference to this topic simply indicates that it reported the substance of the conversation to the Commission for unemployment compensation purposes and does not necessarily reveal "concern" about Aldridge's continued union activity.

The credited testimony establishes that, during the discussion which gave rise to Aldridge's profane outburst, Aldridge was seated among a group of employees at the cafeteria and was discussing with these employees the formation of a union, was urging employees to commence union campaigning as soon as possible, and was expressing to employees how, in his view, unionization would give employees greater job security. During the course of these remarks, employee Jean Jessup, who was seated among this group of employees, reacted to Aldridge's comments by making negative reference, in a loud voice, to "the goddamned union" and by impliedly warning Aldridge that, in her view, Aldridge might be discharged if he continued to support unionization. Angered by Jessup's remarks, Aldridge loudly stated to Jessup, "If you want to be a brown-nosing suck-ass, you can, but I'm not going to be and I never will be one."³

Even assuming, *arguendo*, that Aldridge's discharge was attributable solely to the January 28 incident, as contended by Respondent, it is clear that his discharge was directly attributable to conduct which was part of the *res gestae* of Aldridge's union and protected concerted activities; i.e., his discussion with fellow employees urging support for unionization. In such circumstances, we have long held that, in order for discipline arising therefrom to be privileged, the misconduct at issue must be so flagrant or egregious as to warrant the removal of the Act's protection from the employee's otherwise integrally related protected union and concerted activities. *United States Postal Service*, 250 NLRB 4 (1980); *Thor Power Tool Company*, *supra*. We find, under the circumstances herein, that Aldridge's outburst was not so flagrant or egregious as to remove him from the protection of the Act. We note particularly the credited testimony that the use of profanity by hospital personnel was not uncommon, including its use in the cafeteria, and had been tolerated in the past, that Aldridge's profane outburst was, to some degree, provoked by employee Jessup's intemperate and profane comments to Aldridge regarding unionization and Aldridge's future job status, that Jessup herself frequently used profanity in conversations with other employees, that the outburst was made during nonworking time outside of a patient care area, and that there were apparently few nonemployee visitors in the cafeteria at the time in ques-

³ Jessup's written statement to Respondent complaining about Aldridge's remarks, submitted shortly after the incident, clearly indicates that Aldridge was discussing unionization and job security at the time of the outburst. Thus, it is undisputed that Aldridge was seeking support for unionization among fellow employees during the January 28 discussion and that Respondent was so aware at all pertinent times.

tion and no evidence that any complaints, other than by Jessup, were made to management regarding Aldridge's conduct. Therefore, in these circumstances, and for this additional reason, we agree with the Administrative Law Judge that Respondent's discharge of Aldridge violated the Act.

With respect to the discharge of Rita Craven, we agree with the Administrative Law Judge that the evidence as a whole warrants a finding that Respondent discharged Craven because of her support and activities on behalf of the Union. In adopting the Administrative Law Judge's findings and conclusions in this regard, and in addition to those factors set forth more fully by the Administrative Law Judge at section II,C,5, of his Decision, we note the credited testimony that Craven was the leading employee organizer at the hospital; that Craven's union activities were, on occasion, conducted in the presence of supervisors; that Supervisor Lucille Cowles informed Craven on July 1, 1980, that she was aware of Craven's union activities; that Craven's discharge was effectuated in a particularly summary manner; and that no credible basis existed to support Respondent's contention that Craven, in fact, insubordinately refused a direct work order. Accordingly, in agreement with the Administrative Law Judge, we find that Respondent's discharge of Craven violated Section 8(a)(1) and (3) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Traverse City Osteopathic Hospital, Traverse City, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.⁴

⁴ In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge: These cases were heard before me in Traverse City, Michigan, June 23-25, 1981.¹ The charges were filed by United Steelworkers of America, AFL-CIO, herein called the Union, on July 15, August 1, and February 20; the first complaint issued on August 28; and the consolidated complaint issued on April 1.

¹ All dates are from July 1980 until June 1981, unless otherwise indicated.

The primary issues are whether Traverse City Osteopathic Hospital, the Company or the Respondent, (a) unlawfully promulgated, maintained, and enforced an overly restrictive no-solicitation rule, (b) discriminatorily discharged the leading employee organizer during the Union's organizational campaign, and (c) after the narrow defeat of the Union in the election, discriminatorily discharged another union organizer for discussing a renewal of the organizational drive, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, a Michigan corporation, operates a hospital in Traverse City, Michigan, where it annually receives gross revenues in excess of \$1 million and receives goods valued in excess of \$50,000 directly from outside the State. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

On June 23, 1980, after the latest union organizing began, Bruce Krider came to the hospital as its administrator and executive director. He began leading the Company's campaign to defeat the Union, notifying the employees of the no-solicitation rule, writing personal letters to the employees, and conducting employee meetings.

On July 28, Krider approved the discharge of employee organizer Rita Craven for engaging in "gross insubordination" by purportedly refusing an assignment, without talking to her or making any investigation to verify that there had been such a refusal. Six months later, when union organizer Elbridge Aldridge got into a brief, heated argument with an antiunion employee about the need for the Union and about beginning another union organizational drive, Krider approved his discharge 2 days later without getting his version of what happened.

At the hearing, Krider pointed out that Craven and Aldridge would not have been discharged without his concurrence. He took the position that "If what is being questioned are my motives for discharging anybody," past practice and records are superfluous for determining "how I should be evaluated in this matter as it relates to the union . . . I can't let somebody commit whatever kind of indiscretion because . . . others in past years have gotten away with it. I've got to start with practicing appropriate management and common sense and use what reasonable judgment I have in operating that facili-

ty. And I can't excuse everything because it was handled less than adequately or differently in the past."

The principal question is whether Krider was unlawfully motivated when deciding that these good employees were to be discharged.

B. No-Solicitation Rule

About July 1, at 2:30 p.m., employee organizer Pauline Rosa was standing about 20 feet from the back door of the hospital, preparing to pass out union authorization cards. Administrator Krider told her that she did not have permission to be there, that it was against hospital policy to solicit on hospital premises without authorization from the administrator, and that she should leave. He pointed out the policy in the employees personnel handbook which provided that "Solicitation by hospital employees is . . . prohibited unless such solicitation has been approved by the administrator." (G.C. Exh. 2.) Rosa asked, "Are you sure, because I think you're breaking the law," and Krider answered, "Well, that's the policy."

Later, in employee meetings, Administrator Krider informed employees about the no-solicitation rule, told them that employee Rosa was handing out authorization cards for the Union, and said that she "was asked to leave the premises because she was in violation of the hospital policy regarding solicitation and specifically because she had not gotten the proper authorization per that policy to solicit."

The Company did not change the no-solicitation rule until about 3 months later when it issued a new handbook. Meanwhile, Krider decided not to enforce the old rule and permitted those who were willing to ignore the rule to solicit without his permission. He did not retract what he had told the employees in the meetings.

The first complaint alleged that since about January 15, 1980, the Company unlawfully coerced the employees in the exercise of their Section 7 rights by promulgating and maintaining an overly restrictive no-solicitation rule in the employee handbook, and that about June 30, 1980, the Company promulgated and discriminatorily enforced the rule by asking an employee who was soliciting for the Union to cease and leave the premises. The Company stated in its September 16 answer that these allegations "are each and every one denied for the reason that said allegations are not true." (G.C. Exh. 1g.) To the contrary, the Company finally admitted these allegations at the hearing.

It is well established that "The mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if not enforced," *Staco, Inc.*, 244 NLRB 461, 469 (1979), and that the rule's mere existence tends to "inhibit the union activities of conscientious minded employees," *Custom Trim Products*, 255 NLRB 787 (1981).

I find that during the organizing and election campaign the Company unlawfully maintained the overly restrictive no-solicitation provision in the employee handbook prohibiting employees from soliciting for the Union without approval by the hospital administrator, and that about the first of July it unlawfully promulgated and enforced the rule in violation of Section 8(a)(1) of the Act.

C. Discharge of Rita Craven

1. Her union activity

Rita Craven, a transcriber in the medical records department, had previously worked about 3 years in admitting and medical records before resigning and moving from the city. In September 1979, after Craven returned to the city, Medical Records Director Lucille Cowles telephoned her and asked her to come back to work and she did. Admittedly she did "very good" work.

In the spring of 1980, Craven contacted the Union and became its "key organizer" at the hospital. She scheduled the union meetings, prepared the notices, and openly—in the presence of supervisors—passed out notices, literature, and union cards, and collected the signed cards. On July 1 when Supervisor Cowles gave her the personal letter from Administrator Krider (who presumably addressed such a letter to each of the other employees), Cowles told her, "Rita, I know you are active in the union."

2. Her discharge

The transcribing work in medical records did not include the typing of pathologists' dictation which, as credibly testified by Pathologist Leo Stein, was a "totally different language" not used by other doctors in their general work. When pathology secretary Karen Gray was absent, Supervisor Cowles would assign transcriber Eleanor Myers to go to the lab to type the reports. Sometime earlier, when Gray was sick, Craven complied with Stein's request that she come in on Saturday to do some work for him. She explained that she did not know anything about the pathology work, but he promised to help all he could. "I picked up the earphones and started typing and I left a lot of blanks, a lot of misspelled words, but he was very patient" and made corrections. Then she retyped the material on the regular pathology report form. (Secretary Gray recalled that although Craven "had a lot of problems with the pathology words," Stein said that Craven did a "very good" job. She added, "He says that about everybody." Stein's impression was that the associate pathologist, Dr. Subramanya, had merely a "slight accent" but Gray, who did Subramanya's work, credibly testified that Subramanya "has a very strong accent," that he "is hard to understand even when he is talking regular English," and that someone unfamiliar with pathology terminology would have even more difficulty working for him.)

On July 28, the day of Craven's discharge, she and medical records employees Eleanor Myers and Pauline Rosa went to lunch from 11:45 to 12:15. About noon, in their absence, health record analyst Mary Ann Smith received a telephone call from laboratory aide Ruth Ealy and referred the call to Supervisor Cowles. The aide said that secretary Karen Gray was not there and someone was needed. When Craven, Myers, and Rosa returned from lunch, Cowles called Craven into her office, told her about the call, and in effect asked her if she would go to the lab. As credibly testified by Craven (who impressed me on the stand as being an honest, forthright witness), Cowles said, "Rita, they need someone down in

the Laboratory. Karen isn't here today. They need someone down there to do transcribing." (Cowles did not specifically ask or instruct her to go.) Craven protested, "Lucy, I am not capable of doing that type of work down there. I tried it before and couldn't do it."

In the discussion which followed, Craven asked about sending employee Sue Parent, who had been assigned in early July to work as a "floater" in various departments, including the lab. Cowles attempted to telephone the personnel department but no one answered. She then told Craven, "Rita, I'll go down to Personnel and check for you." Transcriber Myers (who also impressed me favorably as a witness) recalled that after Cowles left, Myers asked Craven what was going on, and Craven said that Cowles had asked her to go to pathology to do transcription and that she told Cowles she felt she was not capable of doing it. Myers asked her where Cowles was then and Craven said she thought Cowles had gone to personnel.

When Supervisor Cowles returned about 15 or 20 minutes later, she went to Craven's desk and told her there was no one in personnel. Myers, who was seated directly behind Craven, was typing and did not overhear this part of the conversation. "But I came to a place where I had to stop and look up a word. And at that point I did hear the conversation. . . . I heard Mrs. Cowles say to Rita that she wondered what they were going to do because they needed somebody in Pathology to do the typing. . . . At that point, I said, 'Lucy, I would be happy to go down to Pathology and do the typing.' And she said, 'That would be fine. I would appreciate it.'" Myers then went immediately to pathology (where she had worked 3 days the week before) and completed the transcribing before Associate Pathologist Subramanya left at 2 o'clock.

Supervisor Cowles left the department and returned about 3:20 p.m. She stopped by Craven's desk, invited her into the office, handed her a termination letter which read, "This is to inform you of your termination . . . for gross insubordination by failing to comply with a direct, reasonable order to report to the laboratory to perform medical transcription work" (G.C. Exh. 5), and said, "You're fired." As Craven credibly testified, "I couldn't believe it. I just sort of was dumbfounded." Craven left the office and handed the letter to Pauline Rosa. Cowles followed and told her, "Rita, go clean out your desk and get out." (Craven had to pick up her 5-year-old son and could not pursue the matter that day.)

The next morning she returned and complained to Administrator Krider, "I did not refuse to do the work. We had discussed Sue Parent. [Cowles] was going to go to Personnel and check on Sue." Krider promised to "dig a little deeper into it" and "get back with me that afternoon." She went home and waited but he did not call. On July 30, Krider's assistant confirmed the discharge, informing her "that there has been no change in the decision of the Hospital." (G.C. Exh. 6.)

3. The Company's defenses

In justification for the discharge, Supervisor Cowles gave conflicting, implausible testimony about what happened, and the Company presented a corroborating wit-

ness who gave a completely fabricated account, not having been present at the time.

At one point Cowles gave testimony which tends to support Craven's version of what happened, that there was no refusal to go to the lab. Cowles testified that after Myers volunteered to go to pathology she reported to Associate Executive Director Kenneth Dextrom "I thought [Craven] refused to do the work and that I felt that she should be discharged." (Emphasis supplied.) Undoubtedly, if her testimony were true that Craven had flatly refused to go, Cowles would not have been reporting to Dextrom that she "thought" Craven refused to do the work.

Cowles testified that when Craven came into her office after lunch, she told Craven "I'd like her to go" to the lab and Craven said "No, I won't go. No way. I'm not going. I'm not going to do that." (Emphasis supplied.) Cowles claimed she told Craven, "Well, you can't refuse to do the work." Later Cowles claimed that Craven said, "Well, then go do it yourself," and went out to her desk and sat down. Cowles testified that after she called back Ruth Ealy in the lab, "I went right directly out to Rita's desk, and I asked—or I didn't ask her; I told her . . . 'The work cannot wait till 5:00. It needs to be done now. Dr. Subramanya will be leaving this afternoon and he wants it done while he's here.' And she said, 'That's ridiculous.' And she would not look up at me. She kept right on typing like I had disappeared." She testified that it was then that Eleanor Myers asked, "Lucy, do you need someone to go down to Pathology?" and she answered that she did.

I note that in giving this version of what happened, Cowles was evidently giving a fabricated account of how an aide was talking to her over the telephone. Cowles claimed that when she asked if the work could wait until 5 o'clock, Ruth Ealy—a laboratory aide, not a pathologist or a person in charge—said, "No if you can't send someone down, I'll just have to wait till tomorrow . . . but you better come up with a better solution the next time." (The aide had difficulty recalling on the stand what happened that day. However, in a memorandum which the aide had secretary Gray type for her the next day (G.C. Exh. 7), the aide recalled that she told Cowles that if someone could be sent, it would be nice, but if not, it could be handled another way.)

In an effort to bolster Supervisor Cowles' claim that Craven had refused to comply with a direct order, the Company produced a witness who was not even present at the time. She was analyst Mary Ann Smith who received the call from the lab about noon and who did not arrive in the cafeteria for lunch until shortly before 12:15, when Craven, Myers, and Rosa returned to work. She had not returned to medical records when Myers volunteered to go to pathology. She therefore had no personal knowledge of the conversations between Cowles and Craven.

By the time Smith was called to the stand, she was prepared to change her earlier versions to conform with that given by Supervisor Cowles. In her pretrial affidavit (G.C. Exh. 15, given August 12, about 2 weeks after Craven's discharge), Smith had claimed that the only

conversation she overheard between Cowles and Craven about going to the lab was after lunch when she received a call from the lab and Cowles took the call, checked on the dictating tanks, and talked to Craven, standing on the side of Craven's desk. (Thus, according to this version, in order for Smith to place herself in medical records at the time of the incident, Smith claimed that she received the call after lunch, not during Craven's lunch and before Smith went to lunch, as actually happened. She claimed that the entire conversation between Cowles and Craven occurred at Craven's desk.) Later, in October when testifying before the Michigan Employment Security Commission (G.C. Exh. 16), Smith claimed that "[i]t was right after she came back from lunch" that she answered the telephone from the lab, and that the only part of the conversation she overheard was when Cowles was at Craven's desk, where the conversation lasted at least 5 minutes. (Not actually having overheard any of the conversations between Cowles and Craven, Smith testified before the Commission that she overheard Cowles telling Craven that she had to go and type for Dr. Stein, whereas in fact the work was to be done for Dr. Subramanya.)

In the absence of any other employee who would support Supervisor Cowles' version of the incident at the hearing, the Company called employee Smith. This time she truthfully testified that she answered the telephone call from the lab about noon (not after lunch as she twice claimed before). This testimony conforms with the accounts given by Cowles and employees Craven, Myers, and Rosa; however, it would place her lunch period afterwards, taking her from the department when Cowles talked to Craven about going to the lab. She had a solution though for this dilemma, testifying:

Q. Do you recall what happened . . . after you transferred the call to Mrs. Cowles?

A. Rita Craven and Pauline Rosa and Eleanor Myers came back from lunch.

Q. Did you go to lunch that day?

A. No, sir, I didn't.

Like Cowles, she appeared on the stand to be willing to give whatever testimony would help the Company's cause.

Contrary to her earlier testimony that the only conversation she overheard was at Craven's desk, Smith testified this time that she overheard Craven, upon being called into Cowles' office, declare in a raised voice, "I will not" and "Then you go do it yourself." She next went further than Cowles' testimony, claiming that she overheard Cowles state at Craven's desk, "I'm not asking you; I'm telling you. *You have to go*"; that Craven answered, "That's ridiculous *I will not go*"; that Cowles said, "But someone has to go and I'm telling you"; to which Craven responded, "No," and "then Mrs. Myers stood up and went back to the Lab." (Emphasis supplied.)

The General Counsel contends that Smith's testimony should be totally discredited. The Company contends that Smith's testimony strongly supports the testimony of Lucille Cowles, that it is sincerely submitted that nobody

listening to Mary Ann Smith's testimony could properly conclude that she fabricated hearing the portions of the conversations to which she testified, and that it is only the more irrelevant details concerning which her memory may be somewhat inconsistent. I disagree and find that Smith, not being present, fabricated hearing the portions of the conversations to which she testified.

Thus, I agree with the General Counsel that both Supervisor Cowles and analyst Smith gave contrived testimony. Having credited the testimony of transcribers Craven and Myers, I find that Craven did not refuse an order to do the pathology transcription work.

4. Administrator Krider's approval of the discharge

Although both Administrator Krider and Medical Records Director Cowles positively testified that nothing was said about Craven's union activities at the time he approved Craven's discharge, I find that Krider's actions belie the denials.

Krider readily approved Craven's discharge upon Cowles' recommendation without giving Craven an opportunity to be heard, without getting her side of the story, and without talking to any of the employees who were present. He did not look at her personnel file. He did not ask if Craven had ever been disciplined and he testified that he could not say to this day whether she had ever been. He admitted that he did not ask what experience she had in making pathology transcriptions or how many times she had done it, testifying, "I was satisfied that she had been asked and had performed the work satisfactorily before." He took the position that she was trained and qualified to do an assigned job and that she refused to do it. That was it.

Krider demonstrated that he was not interested in verifying what actually happened. As Krider testified, Craven came in the morning after the discharge and related her side of the story, which said that she really did not refuse to do it, and Cowles never said that she was going to fire her if she did not, and related some dialogue between Cowles and some other individuals in medical records (evidently referring to the discussion about Sue Parent being hired to do this relief work and transcriber Myers volunteering to do it). He merely called in Cowles again and questioned her about "the specific dialogue" between her and Craven. When Cowles told him that Craven in essence had refused, he still did not talk to any of the witnesses. He claimed that Cowles' position was supported by some witnesses in that department. When later asked who those witnesses were, Krider named Mary Ann Smith (who Cowles undoubtedly knew was not present) and testified that he could not draw back the other name, but there was more than one individual. This purported witness was never identified or called to testify. From his demeanor on the stand, Krider impressed me most unfavorably as a witness. He appeared unwilling to give a candid account of what actually happened.

5. Concluding findings

Medical records transcriber Craven was a valuable employee whom Medical Records Director Cowles had

called back to the job when Craven returned to the city. Cowles admitted that she did very good work.

On one occasion Craven had volunteered to come in on Saturday and work for Dr. Stein transcribing some pathology reports, and had found that she was not qualified to perform that work which involved a totally different language from work she was trained to do in medical records. Since then Cowles assigned transcriber Myers to do the relief work in pathology. In early July, the Company made transcriber Sue Parent (who was trained to do pathology transcriptions) a "floater" to work in various departments as needed, but she was not assigned to do relief work in the lab until after Craven's discharge.

On July 28, after Craven had become the key union organizer, openly campaigning for the Union in the presence of supervisors, the Company decided to assign Craven instead of Myers to do some transcribing for Dr. Subramanya who has a "very strong accent," making the pathology terminology even more difficult to understand. Cowles in effect asked Craven if she would go, telling her that they needed someone down in the laboratory, without specifically asking her if she would go or telling her to. Craven protested that she was not capable of performing the work and suggested that Parent be assigned. When Cowles went to the personnel office to check on Parent's availability and reported back that nobody was there during the lunch hour, she again made another implied request that Craven go to the lab by saying to Craven that she wondered what they were going to do because they needed somebody in pathology to do the typing, whereupon Myers (who had worked in the lab 3 days the week before) volunteered to go.

It was under these circumstances that Administrator Krider decided that Craven should be summarily discharged for "gross insubordination," without making any investigation and without giving Craven an opportunity to be heard. He did not review her personnel file, check on her work record, or learn that she had never been disciplined. When Craven complained to Krider the next day that she did not refuse to do the work, he talked only to Cowles and made no investigation. Then at the hearing, in the absence of any actual witness who would support Cowles' claim that Craven had been insubordinate, the Company called health record analyst Mary Ann Smith who falsely claimed that she was present and that she overheard the conversations between Cowles and Craven.

I discredit Administrator Krider's and Supervisor Cowles' denials and find that they did discuss Craven's union activity when deciding to discharge her. After weighing all the evidence and circumstances, I infer that Krider, as well as Cowles, was aware that Craven did not refuse an assignment and that she was not insubordinate. I agree with the General Counsel that the Company seized upon the reluctance of this key union organizer to perform work for which she was not trained as a pretext for discharging her. I therefore find that the Company discriminatorily discharged Rita Craven in an effort to undercut the union organizational drive and to discourage union support, in violation of Section 8(a)(3) and (1) of the Act.

D. Discharge of Elbridge Aldridge

1. His continued union activities

Aldridge, employed in April 1975, was a highly rated maintenance man who sometimes served as an acting supervisor. In his last evaluation dated April 1980 (G.C. Exh. 17), he was given a favorable rating on all 10 factors. Administrator Krider, who approved his discharge, conceded, "I am not saying Mr. Aldridge can't fix anything. He is probably very good. My frank recollection from a comment, I think it was from Mr. Laukhart [the plant engineer], is that Mr. Aldridge is a good maintenance man. I am not going to dispute that with you or 'pick' that with you; I'd agree."

Before the election, Aldridge actively campaigned for the Union, talking to the employees and passing out union authorization cards, union literature, and meeting notices. In June 1980 (before employee organizer Rita Craven was discharged), Aldridge was sitting in the cafeteria with Plant Engineer Laukhart and Maintenance Supervisor Eugene Zoulek when Craven handed him some union meeting notices to be passed out to the other employees. He passed out authorization cards in the presence of Laukhart and Zoulek an estimated 10 or 15 times.

Sometime in September, as Aldridge credibly testified:

Mr. Laukhart called me in his office and told me that there was a lot of people . . . around the hospital . . . following me, on the union deal. They were listening to me, and . . . he wanted to make sure I knew which way I was going, if I knew what I was doing. He didn't want me leading a bunch of people around for the wrong thing. I told Mr. Laukhart I had been a union man since I was 19 years old. I'm now 49. I'm still a union man and always will be a union man. And he told me that we didn't need a union. . . .

I discredit Laukhart's claim that he did not have any "direct" knowledge of Aldridge's union activities. Laukhart, when testifying, appeared less than candid. Both Laukhart and Administrator Krider admitted knowledge that Aldridge was outspoken in favor of the Union at an employee meeting in the hospital. Personnel Director Norma Pellikka (the third management representative involved in Aldridge's subsequent discharge) was also present at that September meeting where, as Aldridge credibly testified, "I set up there and argued with consultants . . . the hospital hired to break the union . . . I had to take three pills before I got out of there."

Aldridge continued to engage in union activities after the October 17 election, in which the Company narrowly defeated the Union. As he testified, "[W]e held three or four [union] meetings after that. Most of us never stopped talking about it, because we knew April 1 we could start it again. We thought we [came] so close the last time, that one more time we would get it in, so we kept talking." Aldridge discussed the Union in the cafeteria almost every day until January 28, when his mention of the Union and the renewed campaign in the pres-

ence of an antiunion employee led to an argument which resulted in his discharge 2 days later.

2. His discharge

Aldridge's argument in the hospital cafeteria on January 28 was with employee Jean Jessup, who was known for her "filthy mouth." It is undisputed, as various employees testified, that she used profane and abusive language in her regular speech both at work and in the cafeteria. She often used such language when loudly telling "dirty" stories in the cafeteria in the presence of management. On one occasion, in front of Dr. Borenitch and several medical records employees, she told employee Pauline Rosa, "You're a bitch. You're just nothing but a bitch." (As defined in the standard Webster, Random House, and American Heritage desk dictionaries, "bitch" has a meaning of "lewd or immoral woman," "lewd woman," and "spiteful or lewd woman.") Rosa complained orally to Medical Records Director Lucille Cowles and complained in writing to Associate Executive Director Kenneth Dextrom (G.C. Exh. 3), but Jessup was not disciplined. The Company's rules listed "Mental and/or physical abuse of patients, employees, and visitors" as cause for immediate discharge, and "use of profane or abusive language as cause for disciplinary action [which] could include discharge (Resp. Exh. 7)," but the Company did nothing to discourage Jessup's foul language.

It is also undisputed that members of management used rough language in the cafeteria, with Maintenance Supervisor Zoulek using about the same kind of words that Jessup did when telling off-colored stories; Plant Engineer Laukhart saying "son of a bitch"; and Administrator Krider saying "goddamned" and "son of a bitch."

On January 28, Aldridge and employee Marilyn Rutherford were seated with others at a long table in the hospital cafeteria, eating their evening meal. Aldridge and Rutherford were discussing the Union, and Aldridge was complaining about being assigned to the evening shift, interfering with taking insulin for his diabetes and playing in his jazz band. When Jean Jessup and employees Sue Parent and Rose Orth joined them sometime between 5:15 and 5:30 p.m., Aldridge and Rutherford were still discussing the Union. Aldridge was telling Rutherford that they could start passing out union cards April 1 to start a new organizing drive. Jessup was looking at Aldridge when she said in a loud voice to one of the women, "we have to get this done before the goddamned union gets in here" (without explaining what she meant). Becoming incensed, Aldridge told her, "Hey, let's just knock it off about the union . . . if we had one in here, I wouldn't be sitting here eating my supper right now; I'd be home where I belong." Jessup then loudly goaded him further, "Well, if you don't watch it, you'll be playing in your dance band all the time." (Both Rutherford and Orth recalled the reference to Aldridge's band. Rutherford recalled Jessup snapping at him about the "goddamned union, I'm tired of hearing of it," whereas Orth recalled Jessup saying, "Would you just shut up about it. I'm sick of hearing of it." Parent, who was talking to another employee, noticed that Aldridge and Jessup were "getting louder" about Aldridge's feel-

ing on the union, and remembers that Jessup asked him to change the subject because the union was not something that she wished to discuss.) Angered by Jessup's running down the union and warning him about being discharged for supporting it, Aldridge began standing up and loudly stated, "If you want to be a brown-nosing suck-ass, you can, but I'm not going to be and I never will be one."

That ended the conversation. Aldridge sat down and the employees finished their meal. Aldridge's remark was embarrassing to several of the women at the table. Jessup, who regularly used much obscene and vulgar language, testified that she had heard the words "suck," "ass," and "brown nose," but claimed, "I have never heard those four words put together and called something like that in a vile manner." Parent testified that she had heard them several times before but not together, and that she uses profanity herself, such as "damn" and "shit." Rutherford recalled that Aldridge and Jessup were equally angry, and that the employees at the table tried to ignore the situation as best they could and drop it, because it was embarrassing. Regarding the use of swearing words, Rutherford commented, "Oh, I guess we all do . . . when we are pissed off. You hear it on TV. You see it in the movies." Orth testified, "I think most people felt embarrassed at the table." Two of them, Ralph Jones and Mary Wabegijik, resumed their conversation as if nothing had happened. Jones recalled only that Aldridge and Jessup were loud; he did not remember any of the obscene language.

Sue Parent, a defense witness who impressed me as being both honest and forthright, was in a good position to observe whether other people in the cafeteria overheard any of Aldridge's statement. She was sitting at the opposite end of the table from him, with her back to the wall in a position to see everybody in the room. She remembered that Jessup was speaking louder in order to be heard because it was noisy. Aldridge sounded disgusted and mad and said it in a very loud voice. That is what made Parent hear it. She looked out over the room to see if anybody else had heard it, and saw three or four employees at the next table, and one or two persons in street clothes three or four tables away, turn around. Thus, Aldridge's voice was loud enough in the noisy cafeteria for her to hear at the other end of the table, and it attracted the attention of a few persons at two other tables. The evidence does not disclose whether they discerned the words Aldridge used. (Although this was before the visitors' eating time, the persons in street clothes were probably visitors.)

Jessup was the only one who complained about Aldridge's language. The following day when she asked Mary Wabegijik (who sat next to her) to join her in complaining, Wabegijik responded that she did not hear a thing because she was reading the paper.

While testifying about what had happened, Jessup impressed me as deliberately putting on an act, feigning anguish and humiliation, even to the point of crying. Despite the foul, obscene language that she herself frequently used, she claimed:

I was so embarrassed I wanted to crawl underneath my chair I was so embarrassed my face was red. I just put my head down so nobody could see me and I picked at my plate and waited for Rose [Orth] to get up and leave so I could leave with her because I wasn't going to leave alone. I didn't look around. I was very embarrassed. I just wanted to crawl underneath the table so nobody could see me. I was very humiliated because I know other people had heard him. I didn't want them to know he was talking to me like that.

Two days later, without anyone in management having said anything to Aldridge about the incident, Plant Engineer Laukhart, in his office (as Aldridge credibly testified) "asked me if I was talking about the Union and using foul language in the cafeteria Wednesday night. And I told him exactly what I said and what Jeanie Jessup said," frankly admitting the words he had used. (From his demeanor on the stand, Aldridge impressed me as being a sincere, honest witness.) Laukhart then handed Aldridge a statement which Jessup had written with Sue Parent's assistance. The statement, which bore only Jessup's signature, quoted Aldridge's objectionable language and stated that he had used it when he was talking about how the union would give him job security and how union campaigning should be started as soon as possible and "I asked that the conversation be changed." (G.C. Exh. 8.) After Aldridge read the statement, Laukhart gave him his final paycheck and termination sheet which read:

As verified by the attached statement, by one hospital employee and witnessed by another employee, used abusive language, directed toward one employee and witnessed by another, in the cafeteria on January 28, 1981. That language caused the embarrassment of those employees in the presence of other employees and visitors. These offenses are grounds for immediate dismissal from the hospital. Therefore, your employment is immediately terminated on these grounds.

Thus, 2 days had elapsed since the incident, and the Company had decided to discharge the union organizer and had prepared his final paycheck and termination sheet before giving him an opportunity to be heard.

3. The Company's defense

The Company contends in its brief that the discharge arose from Aldridge's loud use of profanity and abuse of a fellow employee in the public cafeteria on the hospital premises and that it was totally unrelated to the employee's union activities.

In support of this defense, Personnel Director Norma Pellikka studiously omitted any reference to the Union in her testimony about her conversations with employees Jessup and Sue Parent concerning the incident. According to Pellikka, Jessup mentioned only Aldridge's complaining about his shift assignment, and when Parent delivered to her Jessup's statement, Parent also mentioned only the shift problem—despite the fact that Jessup

wrote in the statement (G.C. Exh. 8) that Aldridge was talking about how union campaigning should be started as soon as possible, and Parent testified that both Aldridge and Jessup referred to the Union. Pellikka positively denied that in her conversations on January 29 and 30 with Administrator Krider and Plant Engineer Laukhart, there was any mention made by anyone from management at the hospital regarding Aldridge's union activities.

When Laukhart was asked a similar question, concerning any mention of Aldridge's union activities at any time during his conversations with Krider, Pellikka, Maintenance Supervisor Zoulek, or Jessup, he at first equivocated, claiming "Not that I can recall. I don't recall any 'union' mentioned whatsoever." However, on cross-examination he positively testified that there was no conversation about any union activities in the series of conversations he had with Krider, Pellikka, and Jessup.

Similarly, Administrator Krider positively testified "No," that in the course of his review of the recommended discharge there was not any discussion of Aldridge's union activity or leanings. However, on cross-examination Krider did admit that in the "discourse" with Pellikka and Laukhart about what had occurred, "yes, that came out of it," that Aldridge was discussing the Union at the time of the Jessup incident.

Despite these denials, the Company revealed its concern about the Union renewing its organizational drive in its reports to the Michigan Employment Security Commission. The Company's February 11 report began with the sentence: "During his lunch hour on 1/29/81, claimant [Aldridge] was discussing the possibility of unionizing the hospital's employees." (G.C. Exh. 19.) In its March 13 report to the Commission (G.C. Exh. 18), the Company stated in the opening paragraphs:

Upon further investigation of the incident which led to claimant's discharge the hospital has determined the following are the events which led to claimant's discharge.

During the lunch period claimant was discussing the formation of a union in an extremely loud voice. . . .

Thus at the hearing, the Company was endeavoring to conceal its concern about Aldridge's advocating a renewal of the union organizational drive. I discredit the denials by Pellikka, Laukhart, and Krider that they had any discussion of Aldridge's union activity when the decision was being made to discharge him.

4. Administrator Krider's approval of discharge

Apart from the union context, the incident which Krider discussed with Personnel Director Pellikka and Plant Engineer Laukhart involved a very brief exchange, in which Aldridge used four objectionable words in one sentence. (The first two words are considered slang by Webster and Random House and vulgar slang by American Heritage.) Only a few persons at two other tables looked in that direction. None of them, and none of the employees sitting at Aldridge's table—except Jessup, the

antiunion employee—made a complaint about the language used. Insofar as Krider knew, it was merely a passing event which attracted no particular attention among the others, and caused only momentary embarrassment to some nonparticipants sitting at Aldridge's table. From the facts that Jessup had frequently used obscene and vulgar language in the cafeteria, Maintenance Supervisor Zoulek had used similar language there, and both Krider and Laukhart had used some coarse language there as well, Krider undoubtedly realized that the employees were not eating in a pristine atmosphere, sheltered from present day vulgarity.

Krider denied that Aldridge's pronoun status was discussed as it related to anything associated with the case that they were considering, and Laukhart denied that Aldridge's union activities had anything to do with his recommendation that Aldridge be discharged. However, the evidence is clear that Krider's only concern was to find justification for discharging this union organizer.

Finding nothing in Aldridge's personnel file which would provide a justification, Krider asserted that he considered this incident on its individual merits. He admitted that he did not ask anyone what Jessup said that might have led to the incident. He took the position, "I relied on the fact . . . that Mr. Aldridge rose with an outburst of profane and vulgar language in a public place" and "the fact that everybody is responsible for what they do, and regardless of what the situation was, if he wants to act like that, he is going to accept responsibility and the consequences."

Despite Administrator Krider's position that Aldridge's discharge was based solely on the four objectionable words used on this one occasion, the Company took shifting positions at the hearing in an apparent effort to bolster its defense. Personnel Manager Pellikka (who impressed me most unfavorably as a witness) claimed that "this incident in the cafeteria was the last straw." The Company, in offering evidence that from time to time Aldridge went to the linen department where linen clerk Kay Wagner worked, argued that the evidence would indicate the tendencies and abusive nature and character that Aldridge had, and the character of Aldridge is in issue here—his character and his abuse of other individuals being the overriding reasons for his discharge. (As the evidence developed, there was no abuse on Aldridge's part. Wagner complained about the frequency of Aldridge's visits to her department after they decided not to be married.) Also at the hearing, the company counsel asked Aldridge if Plant Engineer Laukhart had previously warned Aldridge about his language problem in abusing other employees. Aldridge agreed that Laukhart had talked to him, explaining that this was when he was serving as an acting supervisor in charge of the maintenance department while Zoulek was off with a broken foot. Two other employees, not Aldridge, were doing the swearing in the maintenance room. Laukhart called Aldridge into the office and told him he would have to stop their swearing because it could be heard "clear up the hallway."

5. Concluding findings

In September, before the election, Aldridge had rebuffed Plant Engineer Laukhart's efforts to persuade him to turn against the Union and not lead a bunch of people around for the wrong thing. Aldridge told Laukhart, "I had been a union man since I was 19 years old and always will be a union man." Aldridge continued to talk in favor of the Union, and was talking in the cafeteria on January 28 about renewing the organizational campaign when he got into the heated argument with the antiunion employee, Jean Jessup. She loudly commented about the "goddamn union" and goaded him further by warning that he would be discharged for supporting it. In anger he loudly responded, "If you want to be a brown-nosing suck-ass, you can, but I'm not going to be and I never will be one." He thus redundantly combined two common vulgar, slang words with two well-known, more explicit obscene words—a combination she claimed she had never heard, despite her frequent use in the cafeteria and at work of such vulgarity and obscenities as "crap," "shit," "mother fucker," "fuck you," and "fucking dummy" (without the Company doing anything to discourage the vulgarity).

Aldridge's choice of words was embarrassing to some of the women at his table, and a few persons at two other tables looked in his direction, but the Company received no complaint from anybody except the antiunion employee.

Before discharging Aldridge 2 days later, the Company did not talk to Aldridge or concern itself with anything except seeking justification for discharging him. Then at the hearing it falsely claimed that his union activities were never discussed during the intervening 2 days, despite the fact that it notified the Michigan Employment Security Commission first that Aldridge was discussing the possibility of unionizing the hospital's employees, and later that he was discussing the formation of a union in an extremely loud voice.

The Company argues in its brief, and I agree, that the employer has the right to exercise its judgment as to what conduct in a specific case warrants discipline, and the extent of that discipline, so long as the reason for the disciplinary action was not the employee's union activity. I do not agree that the causal relationship between Aldridge's union activities and his discharge is highly speculative, and that the discharge was totally unrelated to these activities.

Particularly based on the Company's concern about Aldridge's continued union activity, its conduct in seeking only to justify his discharge instead of giving him an opportunity to be heard or to investigate the circumstances of his outburst, its falsification of testimony to conceal its discussions of his union activities, and its shifting positions at the hearing indicating its endeavor to establish anything plausible to bolster its defense, I find that the Company seized on his outburst as a pretext for ridding the plant of the dedicated union supporter before he could go further in encouraging the renewal of the Union's organizational campaign. I further find that in view of the fact that there was no complaint from anyone except the antiunion employee and in view of the

previous tolerance of obscene and vulgar language in the cafeteria, the incident would have been considered of little consequence in the absence of the union context. I therefore find that the Company discharged union organizer Aldridge not because of his language on this occasion but because of his union activity in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Rita Craven on July 28, 1980, and Elbridge Aldridge on January 30, 1981, because of their support of the Union, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By promulgating, maintaining, and enforcing an overly restrictive no-solicitation rule prohibiting employees from soliciting for the Union without approval of the hospital administrator, the Company violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged two employees, I find it necessary to order it to offer them reinstatement and make them whole for lost earnings and other benefits, to be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER²

The Respondent, Traverse City Osteopathic Hospital, Traverse City, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting United Steelworkers of America, AFL-CIO-CLC, or any other union.

(b) Promulgating, maintaining, or enforcing an overly restrictive no-solicitation rule prohibiting employees from soliciting for a union without approval of the hospital administrator.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Rita Craven and Elbridge Aldridge immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Traverse City, Michigan, copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon their receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herein.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Steelworkers of America, AFL-CIO-CLC, or any other union.

WE WILL NOT prohibit you from soliciting for a union without approval of the hospital administrator.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise

of the rights guaranteed you in Section 7 of the Act.

WE WILL offer Rita Craven and Elbridge Aldridge immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

TRAVERSE CITY OSTEOPATHIC HOSPITAL